United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1573-A

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

H. PERINE,

Plaintiff-Appellant,

vs.

WILLIAM NORTON & COMPANY, INC., WILLIAM NORTON ELINORE NORTON and DESIGNCRAFT JEWEL INDUSTRIES, INC.,

Defendants,

WILLIAM NORTON & COMPANY, INC.,

Defendant-Respondent.

On Appeal from United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-RESPONDENT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1573-A

H. PERINE,

Plaintiff-Appellant,

-against-

WILLIAM NORTON & COMPANY, INC., WILLIAM NORTON, ELINORE NORTON and DESIGNCRAFT JEWEL INDUSTRIES, INC.,

Defendants

WILLIAM NORTON & COMPANY, INC., DEFENDANT-RESPONDENT

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S BRIEF

COUNTER STATEMENT OF THE ISSUES

1. Should an underwriter of a public offering, who admittedly was not a Section 16(b) "insider" prior to the underwriting ("non-insider-underwriter"), incur Section 16(b) liability simply by virtue of its firm commitment underwriting of more than ten percent of the issuer's outstanding stock?

2. Should a non-insider-underwriter be exempt from Section 16(b) liability even though there were no other underwriters participating in the distribution to the same extent as Norton?

3. Should a non-insider-underwriter's remuneration on the distribution be deemed a profit realized on the purchase and sale of securities for purposes of Section 16(b)?

NATURE OF THE CASE:

This is a derivative action instituted by a shareholder of DESIGNCRAFT JEWEL INDUSTRIES, INC. ("Designcraft") alleging violations of Section 16(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78p(b) in connection with the distribution of 300,000 shares of which 250,000 shares were underwritten by WILLIAM NORTON & COMPANY, INC. ("Norton").

The complaint alleges that simply by virtue of its distribution of more than 10% of Designcraft's shares in the course of its firm commitment underwriting of Designcraft's public offering, Norton became an "insider" and is liable under Section 16(b) for all profits upon the distribution of those shares to the public. The complaint does not allege bad faith or any connection with Designcraft other than the role Norton performed as underwriter of its public offering (A-2-5).*

In its answer, Norton denied the substantive allegations of the complaint and interposed two affirmative defenses. The first is that the plaintiff failed to state a claim upon which relief can be granted. The second is that the Court lacks subject matter jurisdiction since

*Notations refer to pages of the Joint Appendix.

SEC Rule 16b-2(a), 17 C.F.R. 240.16b-2(a), specifically exempts an underwriter from liability under Section 16(b). (A7-8).

COURSE OF PROCEEDINGS:

Plaintiff moved for summary judgment on the issue of liability. He also sought leave to amend his complaint to add a new cause of action, add two new individual defendants and preliminarily enjoin the present officers of Norton from dissipating assets in anticipation of judgment. (A 11-12). Norton cross-moved for summary judgment dismissing the complaint on the grounds that Section 16(b) was not intended to extend to an underwriter engaged in a good faith distribution of a substantial block of securities. (A 28). For the reasons contained in the opinion of Judge Robert Ward, which is reported at 372 F. Supp.341, the plaintiff's motion was denied in its entirety and Norton's cross-motion for summary judgment dismissing the complaint was granted. (A 41-54).

COUNTER-STATEMENT OF THE FACTS

At all times relevant to this action, Norton has been a broker-dealer in securities, duly registered with the Securities and Exchange Commission.

On May 23, 1972, Designcraft, a company whose stock was registered pursuant to Section 12(g) of the Securities Exchange Act, made a public offering of 300,000 shares of its common stock. The offering was made pursuant to a prospectus filed with and approved by the Securities and Exchange Commission. Relevant excerpts therefrom appear in the Appendix at pages 23 and 24.

The co-underwriters of this distribution of stock to the public were Norton, who distributed 250,000 shares and Seidlitz & Co. Inc., who distributed the remaining 50,000 shares. The underwriting was a firm commitment underwriting. (A-24).

Between May 23, 1972, and May 31, 1972, all of the Designcraft shares were sold to the investing public by the underwriters and the underwriting closed on May 31, 1972, at which time the underwriters purchased the shares from Designcraft and thereafter delivered them to the buyers.

Norton was not an insider (officer, director or beneficial owner of more than ten percent of Designcraft's stock prior to the underwriting). (A-30) Moreover, the only connection between Norton and Designcraft was by virtue of the underwriting.

PLAINTIFF'S CONTENTIONS:

Plaintiff contends that the doctrine of Stella v. Graham-Paige Motors, 232 F.2d 299 (2d Cir., 1956) cert. denied 252 U.S.831 (1956), that a purchaser of securities becomes an insider at the time of the purchase which brings his holdings above the ten percent provided in Section 16(b) of the Act, strictly applies to an underwriter in these circumstances. (A 43). According to the plaintiff, Norton became an "insider" of Designcraft when it gave a firm commitment to distribute more than ten percent of Designcraft's issued and outstanding stock to the public.

Plaintiff's second contention is that Norton is not entitled to an exemption to Section 16(b) by reason of Rule 16b-2(a) since Norton allegedly did not satisfy one of the three requirements for the underwriter's exemption. (A17) It is highly significant to note that the plaintiff does not contend that Norton failed to satisfy the first two requirements for an exemption under Rule 16b-2(a). However, plaintiff argues that Norton failed to qualify for the exemption because no other underwriter participated in the distribution of Designcraft stock "to an extent at least equal to the aggregate participation" of Norton. (A 17) Thus, when stripped of his obfuscatory verbiage, it is plain that plaintiff predicates his argument solely upon the fact that Norton distributed 250,000 shares of Designcraft stock, whereas the other underwriter distributed only 50,000 shares.

For the reasons hereinafter stated, Norton respectively submits that the District Court's decision rejecting the plaintiff's contentions should be affirmed.

DEFENDANT'S POSITION:

The purpose of Section 16(b) is to prevent insiders-be they officers, directors or ten percent beneficial owners-from realizing a profit through short swing trading since such trading would give them an unfair advantage over the trading public. Section 16(b) was never intended to impose liability for short swing trading upon an underwriter having no other connection with the issuer other than the good faith distribution of a substantial block of the issuer's securities.

The SEC has long realized that the relationship between the underwriter and the issuer is not one which will place the underwriters in an inside position regardless of the number of shares being distributed in the public offering. Recognizing this reality, the SEC promulgated Rule 16b-2(a) specifically exempting underwriters from Section 16(b) coverage once three conditions were met.

NORTON'S CONTENTIONS

As the principal underwriter of Designcraft's public offering, but not an "insider" prior to said

underwriting, Norton did not have to satisfy the requirements of Rule 16b-2(a)(3) for it to be exempt from Section 16b "insider" liability under the Securities Exchange Act.

Norton's position is predicated upon the clear distinction between an underwriter who was a Section 16(b) "insider" prior to the underwriting ("insider-underwriter") (A 43) and an underwriter who may technically become an "insider" solely by virtue of the underwriting ("non-insider-underwriter"). (A 43) Norton concedes that an insider-underwriter would have to comply with Rule 16b-2(a)(3) to qualify for the exemption, but a non-insider-underwriter, such as itself, need not. Therefore, Norton's participation in the underwriting did not give rise to Section 16(b) liability or, conversely, it is exempt from Section 16(b) liability.

Norton states that there are in reality only two requirements which a non-insider-underwriter, such as itself, need comply with to qualify for the exemption, i.e. subdivisions (a)(1) and (a)(2) of Rule 16b-2. (A 55) That is so because it has never been intended that a non-insider-underwriter need comply with subparagraph (a)(3), (A 55), which is designed to apply only to insider-underwriter.

It is Norton's position that while a firm commitment underwriter of more than 10% of an issue might be converted first into a purchaser (B-8)* and then into an "insider". (B 11-12), such analysis, when applied to a non-insider-underwiter, not only flies in the face of reality, it would create a liability not comprehended to have been within the purpose of Section 16(b) and wreck havoc upon the securities industry.

While technically Norton may be a "purchaser", in reality Norton is nothing more than the conduit through which Designcraft's securities flowed to the investing public and back through which the public monies flowed to the corporation.

Therefore, any and all discussions of Norton as a "purchaser" or "insider", while interesting, are totally irrelevant and form no part of a well reasoned analysis of the intended purpose and scope of either Section 16(b) liability or the underwriters exemption therefrom, in the context of a non-insider-underwriter.

*Notation refers to pages of Appellant's Brief

POINT I

SECTION 16(b) WAS NOT DESIGNED TO BE APPLIED TO AN UNDERWRITER OF A PUBLIC OFFERING WHO WAS NOT A SECTION 16(b) "INSIDER" PRIOR TO THE UNDERWRITING.

Section 16(b) provides that any profits realized by a statutorily defined corporate "insider" from "any purchase and sale" or "any sale and purchase" of any equity security of his corporation within a period of less than six months are recoverable by and or on behalf of the corporation.

Admittedly, Norton was the underwriter of a firm commitment public offering of Designcraft common stock, in May 1972; the offering involved a distribution of more than ten percent of Designcraft's issued and outstanding stock; and it was completed in less than a six months period. However, Norton emphatically denies being an "insider" of Designcraft who was possessed of prior insider information of the type the misuse of which Section 16(b) was designed to prevent and is therefore not within the intended ambit of Section 16(b) liability or is exempted therefrom.

Section 16(a) defines a corporate insider as being any person who is directly or indirectly the beneficial owner of more than 10 percent of a class of stock of his issuer, or an officer or director of the issuer. Plaintiff does not contend that Norton is, or ever was, a director

or an officer of Designcraft.

However, plaintiff does contend that Norton, simply by virtue of its firm commitment to underwrite more than 10 percent of Designcraft's stock, purchased it (B-8) and therefore was the beneficial owner thereof, and, because it sold the stock, albeit, in connection with Designcraft's public offering, Norton's renumeration for its services, viewed as profits, were subject to recapture under Section 16(b). (B-4).

As specified in its introductory clause, Section 16(b) was enacted "(f) or the purpose of preventing the unfair use of information which may have been obtained by (a statutory insider)...by reason of his relationship of the issuer." Where, such as here, there is no allegation that Norton had access to advance inside information, or an allegation that Norton exploited information to achieve short-swing profits, or that Norton was an insider prior to engaging in the underwriting, it is clear that Section 16(b) is wholly unapplicable. Kern County Land Company v. Occidental Petroleum, 411 U.S. 582 (1973).

In Kern County, Mr. Justice White articulated the standards for imposing Section 16(b) liability:

> "In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent - the realization of short-swing profits based upon access to inside information - thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits." 411 U.S. at 594-595."

Even under this standard, there must be proof of actual abuse of insider information and proof of an intent to profit on the basis of such information before Section 16(b) liability will be extended to transactions bordering upon the outer limits of the statute. Kern County Land Company v. Occidental Petroleum, 411 U.S. at 595; Gold v. Sloan, 486 F. 2d 340, 343 (4th Cir., 1973) reh. den. 391 F. 2d 729 (4th Cir., 1974). It is clear that the Designcraft underwriting was a standard, not unorthodox underwriting, and the transaction did not even approach, let alone border on, the outer limits of Section 16(b).

It is now well established that Section 16(b) should not be applied in circumstances such as those herein where the Plaintiff does not even allege there

was actual misuse of inside information and an intention to profit on the basis of such information. Kern County Land Company v. Occidental Petroleum, 411 U.S. at 595. Thus, a Supreme Court has twice said that:

> "Where alternative constructions of the terms of Section 16(b) are possible those terms are to be given the construction that best served the Congressional purpose to curbing short swing speculation and short swing insiders." Reliance Electric Company v. Emerson Electric Company 404 U.S. 418, 424, (1972); Kern County Land Company v. Occidental Petroleum, supra; See also, Champion Home Builders Co. v. Jeffers 490 F.2nd 611 (6th Cir. 1974).

It is manifest, therefore, because there are not inherent in the factual context of this underwriting, or similar underwritings, the potentials for the abuses Section 16(b) was intended to prevent, that, therefore, Section 16(b) must not be applied, for clearly this transaction was "not comprehended within the purpose of said section". Rule 16b-2(a).

Norton, and other non-insider underwriters, while technically "purchasers" and "sellers" of the stock distributed to the public, can in reality only be viewed as the conduit through which the issuer's stock is funneled to the public and back through which the public money is channeled to the issuer.

Bearing in mind that the legislative intent behind the Exchange Act was two fold: (a) to protect the investing public and (b) to continue the existence of securities exchanges as part of the country's economic system, House Report No. 1383, 73d Congress, 2d Session; 1934; and Senate Report No. 1455, 73d Congress, 2d Session, 1934, it becomes clear that to give life to plaintiff's interpretation of the purpose of Section 16(b) and the need for Norton, and similarly situated underwriters, to meet the requirements of Rule 16b-2(2)(3) before they qualify for the Rule 16b-2(a) exemption, would not serve the first objective and would run counter to the second.

The evil Section 16(b) was designed to prevent the misuse of advance inside information by corporate insiders. As a non-insider-underwriter prior to Designcraft's offering, Norton did not have access to inside information nor did it abuse such information. Therefore Section 16(b) is totally inapplicable in these circumstances.

POINT II

NORTON IS ENTITLED TO AN EXEMPTION FROM SECTION 16(b) LIABILITY BY VIRTUE OF SEC RULE 16b-2(a)

The SEC has long recognized that the relationship between the underwriter and the issuer is not one which places the underwriter in an inside position regardless of the number of shares the underwriter is distributing. Recognizing the realities involved in underwriting a public offering, the SEC promulgated Rule 16b-2(a) to exempt underwriters from Section 16(b) coverage once three conditions are met.

In substance, the first two conditions require that:

(a) the underwriter be participating in a good faith distribution in the regular course of his business; and

(b) the securities be acquired from or through the issuer for the purpose of effecting the distribution.

The entire foundation of the plaintiff's claim is predicated upon his mistaken interpretation of the third condition of Rule 16b-2(a), which plaintiff claims Norton did not satisfy. However, a fair reading of Rule 16b-2(a)(3) reveals that Norton satisfies that condition

and, therefore, qualifies for an exemption from 16(b) liability.

In pertinent part, Rule 16b-2(2)(3) provides that in order for an underwriter to be exempt from Section 16(b) liability:

> "Other persons not within the purview of Section 16(b) of the Act are participating in the distribution of such block of securities on terms at least as favorable as those on which such person is participating and to an extent at least equal to the aggregate participation of all persons exempted from the provisions of Section 16(b) of the Act by this §240.16b-2...."

Plaintiff alleges that Norton "purchased" more than ten percent of Designcraft stock in the course of the public offering and thereby became a Section 16(b) insider. Plaintiff then alleges that since Norton's co-underwriter, Seidlitz and Company, Inc., did not participate in the offering to the same extent as Norton-Seidlitz distributed 50,000 shares to the public whereas Norton distributed 250,000 shares to the public - Norton did not comply with Rule 16b-2(a)(3).

After carefully reviewing the evolution of Rule 16b-2(a)(3) (A45-53) the District Court rejected (A 44) these contentions and held that the rule was designed to exempt all underwriters

except those underwriters that are within the purview of the Act by reason of their pre-existing relationship with the issuer as officers, directors or ten percent beneficial owners. (A 44, 47, 54).

On June 8, 1935, the SEC issued Release No. 264 (Class A) announcing the adoption of Rule NB2 creating an "exemption from Section 16(b) of certain distributing and underwriting transactions". In paragraph "C" thereof, the Commission stated:

> "If the person effecting such transaction is either (1) an officer or director of the issuer, (2) a firm of which such officer or director is a partner, or (3) a corporation or other person in respect of which such officer or director is an officer, director or beneficial owner, directly or indirectly, of more than ten percent of any class of equity security, then other persons who are not specified in clauses (1), (2) or (3), of this paragraph (c) must have participated in the purchase of such security (or other securities of the same issue) with a view to the distribution thereof, on terms identical with those on which such specified persons have participated and to an extent at least equal to the aggregate participation of all such specified persons." (Emphasis supplied).

This language is significant since it illuminates the true purpose for including paragraph (c) as a condition to the Rule 16b-2(a) exemption. From the Commission's

language, it is plain that paragraph (c) only applies as a condition if the underwriter is a pre-existing insider, i.e., the underwriter was an officer, director or ten percent beneficial owner prior to engaging in the underwriting.

The SEC promulgated paragraph (c) to distinguish underwriters having a pre-existing relationship with the issuer from underwriters brought in solely for the purpose of effecting the distribution in a security. Thus, a fair reading of paragraph (c) of Rule NB2 manifests that the potential abuse the SEC seeks to avoid is embodied in the situation where the underwriter is a pre-existing insider. As a pre-existing insider, the underwriter is likely to have a smaller interest in checking upon the issuer's claims and cannot be expected to review the same with a watchful and unbiased eye as the underwriter of a public offering who has certain due diligent obligations. Moreover, such review by a pre-existing insider-underwriter is likely to be biased. It is for these reasons that the SEC adopted sub-paragraph (c) as a condition for the Rule 16b-2(a) exemption.

In operation, sub-paragraph (c) of Rule NB2 requires that a pre-existing insider-underwriter be subject to certain controls to insure that the underwriter's due diligence will be critical and unbiased. To effect this purpose, the Commission requires that another non-insider-underwriter participate on terms at least as favorable on those which the insider-underwriter is participating and at least equal to the aggregate participation of the pre-existing - insider-underwriter.

Plaintiff attempts to twist the meaning of the language of Release No. 535 to support his contention. He specifically refers to the last paragraph of said Release which reads:

> "The second change in the rule enlarges the scope of the original exemption by making it available, on specified conditions, to any person who, with a view to distribution, acquires more than ten percent of the equity securities of the issuer from its parent, subsidiary, or commonly controlled affiliate, or from individuals in similar relationships to the issuer. This second change is to become effective immediately."

This language refers to the second change in the Rule 16b-2(a) exemption which was effected by Release No. 535 found on Page 28 of plaintiff's brief.

However, the operative effect of the change is to enlarge the exemption so as to include the acquisition of stock by the underwriter from not only the issuer (as previously provided) but also from its parent, subsidiary or commonly controlled affiliate, or from individuals in similar relationships to the issuer. Thus, plaintiff's reliance on the last paragraph of Release No. 535 is clearly misplaced as the result of his having taken this quote out of context and use it in support of a totally unrelated argument.

As further indication of the twisted logic employed by the plaintiff's reasoning, reference is made to Paragraph 1 of Release No. 535 (Class B), which appears on Page 27 of the plaintiff's brief. This paragraph provides:

> "The Securities and Exchange Commission has amended Rule NB2, making two changes in its provisions. The rule exempts from Section 16(b) of the Securities Exchange Act of 1934, transactions of certain underwriters who otherwise would be accountable to issuing companies for profits realized in the distribution of such companies' securities. The rule is applicable to individuals acting as underwriters if they are officers, directors, or principal stockholders of the issuer, and to underwriting corporations or firms if they are principal stockholders of the issuer." (Emphasis added)

This language clearly explains that the Rule 16b-2(a) exemption is applicable only if the underwriter is otherwise an insider. The thrust of this change is further clarified by the following explanation:

> "The second change in the rule enlarges the scope of the original exemption by making it available, on specified conditions, to any person who, with a view to distribution, acquires more than 10% of the equity securities of the issuer from its parent, subsidiary, or commonly controlled affiliate, or from individuals in similar relationships to the issuer. This second change is to become effective immediately. Sec. Ex. Act Rel.535 (1936).

Paragraph (c) then read:

> "(c) If the person effecting such transaction is either (1) an officer or director of the issuer, (2) a firm of which such officer or director is a partner, employee, appointee, nominee or representative, or (3) a corporation or other person in respect of which such officer or director is an officer, director, employee, appointee, nominee, representative or beneficial owner, directly or indirectly, of more than 10 per centum of any class of equity security, then other persons who are not specified in clauses (1), (2) or (3), of this paragraph (c) must have participated in the purchase of such security (or other securities of the same issue) with a view to the distribution thereof, on terms identical with those on which such specified persons have participated and to an extent at least equal to the aggregate participation of all such specified persons."(Emphasis added)

In 1947 the SEC further amended the rule, but clarly stated its understanding of the rule's effect:

> "These rules conditionally exempt underwriting transactions from Sections 16(b) and 16(c) of the Securities Exchange Act of 1934. Section 16(b) is the section which provides that any profit realized by a beneficial owner of more than ten percent of any class of any equity security registered on a national securities exchange, or by a director or officer of the issuer of such a security, as a result of any purchase and sale (or sale and purchase) of any equity security of such issuer within a period of less than six months shall inure to the corporation. Section 16(c) prohibits short sales of such equity securities by such persons. The two rules exempt bona fide underwriting transactions by dealers who fall within one of the three classes of 'insiders' specified in Section 16, or by dealer firms with which such persons are connected. However, in order to prevent such 'insiders' or 'insider firms' from acquiring a preferential position where they participate in a distribution, the exemptions afforded by the two rules are subject to the condition that 'non-insiders' or 'non-insider firms' shall have participated in the distribution 'on terms at least as favorable' as those on which the 'insiders' have participated and 'to an extent at least equal to the aggregate participation' of all 'insiders' ". Sec. Ex.Act Rel. 3907.

In 1952, the Commission restructured the rule. However, there was no indication in its release that

the Commission shifted to the viewpoint that an underwriter could become an insider simply by virtue of its distributing activities. It indicated only that the amendment made in 1936 was being further extended:

> "The new rule X-16B-2 broadens the prior rule by providing that the exemption is available for transactions of purchase and sale of securities in the course of a distribution of a block of securities on behalf of a security holder not standing in a control relationship to the issuer, as well as to other public distributions where the transactions are in the course of a public distribution of an issue of securities on behalf of an issuer, or a person who does stand in a control relationship to the issuer." Sec. Ex.Act Rel. 4754 (1952)

As presently structured, Rule 16b-2(a) is as follows:

> "Rule X-16B-2. Exemption from Section 16(b) of Certain Distributing Transactions.
>
> (a) Any transaction of purchase and sale of a security which is effected in the distribution of a substantial block of securities of the same class shall be exempt from the provisions of Section 16(b) of the Act, to the extent specified in this rule, as not comprehended within the purpose of said section, upon the following conditions:
>
> (1) The person effecting the transaction is engaged in the business of distributing securities and is participating in good faith, in the ordinary course of such business, in the distribution of such block of securities;

(2) The security involved in the transaction is a part of such block of securities and is acquired by the person effecting the transaction, with a view to the distribution thereof, from the issuer or other person on whose behalf such securities are being distributed or from a person who is participating in good faith in the distribution of such block of securities; and

(3) Other persons not within the purview of Section 16(b) of the Act are participating in the distribution of such block of securities on terms at least as favorable as those on which the person effecting the transaction is participating and to an extent at least equal to the aggregate participation of all persons exempted from the provisions of Section 16(b) of the Act by this rule. However, the performance of the functions of manager of a distributing group and the receipt of a bona fide payment for performing such functions shall not preclude an exemption which would otherwise be available under this rule."

The basic structure of the rule as it has evolved since 1935 manifests that the purpose of Rule 16b-2(a) is to ensure that an underwriter having a pre-existing inside relationship with the issuer should not have an unfair advantage in the distribution of the issuer's shares. To prevent such an advantage, the rule requires other non-insider-underwriters participate with the insider-underwriter on a basis at least equal to the insider-underwriter.

Since Norton was not an insider of Designcraft before, during or after the underwriting, Rule 16b-2(a)(3) should not exclude Norton from the underwriters' exemption.

Judge Ward recognized that Norton's distribution of Designcraft stock was an exempt transaction under Rule 16b-2(a):

> "...The Securities and Exchange Commission releases which refer to the rule in question indicate that the Commission also does not consider an underwriter of a large block of securities an insider solely by virtue of a single underwriting venture, but understands the provision to refer only to underwriters with some other connection with the issuing corporation." (Emphasis added) (A-44)

Since there were no "such persons" who were "persons within the purview of Section 16(b)" prior to the underwriting, who were acting as underwriters of the public offering herein, there could not be any "other persons not within the purview of Section 16(b) of the Act [to participate] in the distribution of such block of securities on terms at least as favorable as those on which such person is participating..." Rule 16b-2(a)(3). (Emphasis added)

Put another way, Norton states that either subdivision(a)(3)'s requirements were never intended to apply to the type of underwriting herein involved or that its

requirements are met simply by virtue of the fact that because no insider-underwriter had any participation in the distribution, other "persons not within the purview of Section 16(b) of the Act" did participate to the same extent, i.e. zero!! In either case Norton qualifies for the exemption.

Norton respectfully submits that the opinion of the District Court is in full accord with the purpose of the rule and its decision should be affirmed.

POINT III

A NON-INSIDER-UNDERWRITER'S REMUNERATION SHOULD NOT BE SUBJECT TO SECTION 16(b) RECAPTURE

To deprive a non-insider-underwriter engaged in a good faith distribution of an issuer's stock of his profit simply because, as principal underwriter, he took down the major portion of the offering will severely restrict future public offerings for no legitimate reason.

Underwriters are in the industry to make money by providing a very specialized service. Section 16(b) is designed to prevent the misuse of inside information in general. Rule 16b-2(a) is designed to allow underwriters to exist - for without a profit they could not and would not provide their services.

The requirements set forth in Rule 16b-2(a)(3) were specifically designed to guard against a particular evil - misuse of non-public information by an insider - underwriter.

Where there is no such insider-underwriter it is sheer folly to argue that a non-insider-underwriter must lose his profit simply because he failed to structure his underwriting so as to guard against a concededly non-existant potential for abuse.

Judge Ward recognized Norton's right to a Rule 16b-2(a) exemption when he stated:

> "...the Securities and Exchange Commission releases which refer to the rule in question indicate that the Commission does not consider an underwriter of a large block of securities an insider solely by virtue of a single underwriting venture, but understands the provision to refer only to underwriters with some other connection to the issuing corporation."

To adopt plaintiff's position, not only will be to fly in the face of reality but will work at cross purposes with the underlying legislative intent.

CONCLUSION

BY REASON OF THE FOREGOING, THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT DISMISSING THE COMPLAINT SHOULD BE AFFIRMED.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

UNITED STATES COURT OF APPEALS:SECOND CIRCUIT

PERINE, Plaintiff-Appellant, against NORTON & CO., et al Defendants.	Index No. Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 250 West 146th Street, New York, New York

That on the 13th day of September 1974 at 41 E. 42nd St., New York deponent served the annexed Respondent's Brief upon Kaufman, Talyor, Kimmer & Miller the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 13th day of September 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975